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Nos. 02-1674 and 02-1675

IN THE

Supreme Court of the United States

SENATOR MITCH MCCONNELL, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

NATIONAL RIFLE ASSOCIATION, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

On Appeals from the
United States District Court
for the District of Columbia

INTERVENOR-APPELLEES' RESPONSE TO JURISDICTIONAL STATEMENTS

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QUESTIONS PRESENTED

1. Whether the Court should summarily dispose of the McConnell appellants' constitutional challenges to Sections 211, 212, and 214 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, because those challenges were either waived below, or are plainly nonjusticiable or insubstantial under settled law.

2. Whether, in other respects, the Court should note probable jurisdiction over the McConnell and NRA appellants' constitutional challenges to BCRA, and set the appeals on those issues for briefing and oral argument.

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INTERVENOR-APPELLEES' RESPONSE TO JURISDICTIONAL STATEMENTS

INTRODUCTION

Although intervenor-appellees take issue with the positions taken on the merits by Senator McConnell, *et al.*, and the National Rifle Association, *et al.*, in their jurisdictional statements, we agree that most of the questions presented in their jurisdictional statements warrant plenary consideration by this Court.[1] In light of

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[1] Intervenor-appellees are Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords. They were granted leave to intervene as of right in the proceedings below pursuant to BCRA § 403(b) and Fed. R. Civ. P. 24(a)(1). *See* Orders of May 3 and May 10, 2002 (granting intervention). The intervenors are also appellants in No. 02-1702, *McCain* v. *McConnell*. *See* 02-1702 J.S. 15 & n.17.

Sections 403(a)(3) and (a)(4) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, which provide for direct and expedited review in this Court of any final decision of a three-judge district court hearing a challenge to the constitutionality of BCRA, and in light of the importance of the issues to the nation, intervenor-appellees agree with the McConnell and NRA appellants that the Court should note probable jurisdiction over these appeals and set the case for briefing and oral argument.

Some of the questions presented in Senator McConnell's jurisdictional statement (No. 02-1674), however, do not warrant plenary consideration by this Court. Those questions seek (in whole or in part) to raise challenges to BCRA that were unequivocally waived below, or are clearly nonjusticiable under well-settled principles of constitutional and administrative law, or are otherwise so insubstantial as not to justify further briefing and argument (particularly given the number and complexity of the other issues properly before the Court). Summary disposition of those issues at this stage of the case would focus the briefing on the remaining issues that do warrant this Court's plenary review, and may assist in the orderly resolution of these appeals. Accordingly, the Court may wish to consider summarily disposing of the following issues:

First, the Court should summarily dispose of Senator McConnell's challenge to a provision in BCRA Section 212 requiring disclosure of contracts to make disbursements with respect to independent expenditures. *See* McConnell J.S. Question Presented 3 and pp. 14-15. Under settled law, that challenge is clearly nonjusticiable.

Second, the Court should summarily dispose of all challenges to the "independent" and "coordinated" expenditure provisions in BCRA Sections 211 and 214. *See* McConnell J.S. Question Presented 4 and pp. 15-16. Appellants waived all claims with respect to Section 211; their challenges to Section 214(b) and (c) are clearly

nonjusticiable; and their other challenges to Section 214 are insubstantial under settled law.

ARGUMENT

I. APPELLANTS FAIL TO RAISE JUSTICIABLE OR SUBSTANTIAL QUESTIONS WITH RESPECT TO ANY "ADVANCE NOTICE" REQUIREMENT IN BCRA SECTION 212

The third question presented in Senator McConnell's jurisdictional statement is "[w]hether the district court erred by holding nonjusticiable challenges to, and upholding, portions of the 'advance notice' provisions of BCRA . . . because they violate the First Amendment." The targeted provisions are disclosure requirements in BCRA Section 212 applicable to "independent expenditures."[2] Appellants contend that, because the statutory language refers to the disclosure not only of disbursements but also of contracts to make such disbursements, the statute must be read as requiring disclosure in advance of any actual independent

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[2] Senator McConnell has also presented a constitutional challenge to the "advance notice" requirement of BCRA § 201 in his jurisdictional statement, *see* McConnell J.S. Question Presented 3 and pp. 14-15. In fact, Senator McConnell prevailed on that challenge in the district court. Section 201 of BCRA amended 2 U.S.C. § 434(f) to add disclosure requirements with respect to disbursements for "electioneering communications" "if the person has executed a contract to make the disbursement." The district court ruled that appellants' constitutional challenge to Section 201 was ripe, *see* Supplemental Appendix to Jurisdictional Statement (JSSA) 109-11sa (per curiam), and ruled in their favor on the merits as well, JSSA 115sa (per curiam). The government has appealed from that aspect of the district court's decision. *See* No. 02-1676, Gov't J.S. 26-27. Senator McConnell, however, may not appeal from the district court's ruling in his favor on that point. *See Perez* v. *Ledesma*, 401 U.S. 82, 87 n.3 (1971); *Public Serv. Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939).

The district court also held that the challenged "advance notice" requirement of BCRA § 201 is severable from the remainder of that section. JSSA 115-16sa (per curiam); *see* BCRA § 401 (severability provision). Senator McConnell's jurisdictional statement does not mention, let alone contest, that severability ruling, which applied well-established law.

expenditures. That requirement, they assert, "will chill the exercise of free speech by forcing would-be speakers to disclose their plans in advance." McConnell J.S. 15.

That challenge warrants summary disposition. The FEC's regulations implementing Section 212 unambiguously construe the statute *not* to require such advance disclosure. *See* 68 Fed. Reg. 404, 452 (Jan. 3, 2003) (to be codified at 11 C.F.R. § 109.10). The district court therefore found no current threat that appellants, or anyone else, will have an advance-notice requirement enforced against them under Section 212. *See* Supplemental Appendix to Jurisdictional Statement (JSSA) 130-34sa (per curiam).[3]

Nowhere in Senator McConnell's Jurisdictional Statement is there any argument explaining why appellants think the district court's opinion was wrong on this point. Nor is there any apparent argument to be offered. It is black-letter law that "an actual and well-founded fear that the law will be enforced" is a prerequisite to a finding of a case or controversy when a plaintiff seeks pre-enforcement review of the constitutionality of a statute on First Amendment grounds. *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 393 (1988).[4] In light of the FEC's regulations, there can be no credible threat that Section 212

[3] In the district court, another of the parties challenging Section 212 on this basis argued that the FEC regulations offered no assurance against enforcement of an "advance notice" requirement because the regulations "may not be approved by Congress" or the Commission might later change its mind. JSSA 134sa (per curiam). The congressional review period has now passed, however, and the regulations remain in effect. And the FEC could not, of course, change its mind without notice-and-comment rulemaking. If it did so, a case or controversy might then be presented, but that purely speculative possibility does not create a present threat that the statute will be construed in the manner the challengers claim to fear.

[4] *See also Renne* v. *Geary*, 50 U.S. 312, 323 (1991); *Wisconsin Right to Life, Inc.* v. *Paradise*, 138 F.3d 1183, 1185 (7th Cir. 1998) (holding that a challenge to a state election law did not present a case or controversy where an opinion of the state attorney general and a regulation of the state elections board precluded application of the law to the challenger).

will be enforced to require appellants to give "advance notice" of their disbursements as they have contended. The district court therefore correctly concluded that appellants' challenge to Section 212 is nonjusticiable, and this Court should summarily dispose of that challenge.

II. APPELLANTS FAIL TO RAISE JUSTICIABLE OR SUBSTANTIAL QUESTIONS WITH RESPECT TO THE COORDINATION PROVISIONS OF BCRA SECTIONS 211 AND 214

The fourth question presented in Senator McConnell's jurisdictional statement is "[w]hether the dstrict court erred by holding nonjusticiable challenges to, and upholding, the 'coordination' provisions of BCRA (sections 202, 211, and 214), because they violate the First Amendment." The Court should summarily dispose of appellants' challenges to Sections 211 and 214 because (a) appellants expressly waived all challenges to Section 211; and (b) the rulemaking provisions of Section 214 present no justiciable issues, and the remaining provisions raise no substantial issue warranting plenary consideration.[5]

A. Section 211 amends FECA to include, in the definition of "independent expenditure," any expenditure that is "not made in concert or cooperation with or at the request or suggestion of [a] candidate, the candidate's authorized political committee, or their agents, or a political party or its agents." Senator McConnell now seeks to

[5] Appellants' constitutional challenge to the coordination provisions of Section 202, although flawed, does present a substantial question insofar as that section is linked to the "electioneering communications" provisions of BCRA that are before the Court. *See* McConnell J.S. 16. As the district court majority noted, however, some of the Section 202 arguments made below also "challenge[] the scope of activities covered by BCRA's definition of 'coordination' "; the majority concluded that those arguments "are not ripe given the statutory construction of Section 214 and the recent promulgation of final regulations by the FEC." JSSA 130sa (per curiam). If any appellant presses such arguments in this Court, the Section 202 questions are to that extent nonjusticiable and insubstantial for all the reasons set forth in this response with respect to appellants' claims regarding Section 214.

challenge Section 211 on First Amendment grounds. *See* McConnell J.S. Question Presented 4 and pp. 7, 15-16. In the district court, however, Senator McConnell and other plaintiffs challenging BCRA waived all challenges to Section 211. Neither the Per Curiam opinion's "Chart of the Court's Rulings" nor Judge Henderson's comprehensive "catalogue" of all challenges to BCRA's provisions contains any reference to Section 211. *See* JSSA 10-15sa (per curiam); JSSA 186-214sa (Henderson). The reason for this omission is spelled out on page 128sa, note 81 of the Per Curiam opinion:

> Although Plaintiffs ask for judgment as to BCRA's Section 211, . . . at oral argument they stated that they were not challenging the provision. *See* Tr. at 341-42 (Judge Henderson: Mr. Starr, I've got down that you all are challenging [Section] 211. Am I wrong about that? . . . [Mr.] Baran: We are not challenging section 211[.]). Furthermore, other than a description of the provision, . . . Plaintiffs' briefs are silent on the provision. (Second alteration in original.)

It is difficult to imagine a more plain case of waiver.[6] *See, e.g., United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001) (declining to allow a challenger "to assert new substantive arguments attacking . . . the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it"); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *Dothard* v. *Rawlinson*, 433 U.S. 321, 323 n.1 (1977).

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[6] The waiver at oral argument was carefully considered. Judge Henderson had earlier asked an attorney from the FEC a question about BCRA § 211, and he responded: "They haven't challenged that. There's been no briefing on that. That's not part of their lawsuit." Tr. at 316 (Mr. Kolker). In response to Judge Henderson's question quoted above, Mr. Starr responded: "I need to double-check our list of provisions . . . . If it deserves to be challenged, we will challenge it. (Laughter)." *Id.* at 341. Following a 15-minute recess during which plaintiffs' counsel conferred among themselves, Mr. Baran reported back that "[w]e are not challenging section 211[.]" *Id.* at 342.

B. The heart of Section 214 is Congress's repeal of what it deemed to be an errant FEC rule defining "coordination" between a candidate or party and an outside spender, with instructions to the agency to go back to the drawing board and prepare new regulations. This Court and Congress have long recognized that, to prevent evasion of the campaign finance laws through "wink or nod" arrangements, "coordination" must be defined in a broad and realistic manner. *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 442 (2001) (*Colorado II*); *see also Buckley* v. *Valeo*, 424 U.S. 1, 46-47 & n.53, 78 (1976) (per curiam).

In December 2000, however, a divided FEC promulgated new regulations redefining "coordination" much more narrowly in the context of "general public political communications." *See* 65 Fed. Reg. 76138 (Dec. 6, 2000); *see also* 66 Fed. Reg. 23537 (May 9, 2001) (final rule and effective date); 11 C.F.R. § 100.23 (2002), *repealed by* BCRA § 214(b). The FEC's December 2000 rules provided in material part that coordination could be found between a candidate and a third party only where the third party's communication was "created, produced or distributed" (1) "[a]t the request or suggestion of the candidate," (2) after the candidate "has exercised control or decision-making authority" with respect to the communication, or (3) "[a]fter *substantial discussion or negotiation ... the result of which is collaboration or agreement*" between the third party and the candidate. 11 C.F.R. § 100.23(c)(2)(i)-(iii) (emphasis added).

The new rules drew immediate and extensive criticism both on and off the Commission. A recurrent complaint was that the rules were "far too narrowly drafted and [would] make evasion of [FECA] commonplace"—for example, through the use of inside information by consultants and employees who could achieve *de facto* coordination through informal means while purporting to avoid the more formal arrangements that triggered coverage under the FEC

rules.[7] Section 214 followed directly from these criticisms. Section 214(a) repeals the Commission's former rules, effective December 22, 2002; (b) provides that the Commission "shall promulgate new regulations on coordinated communications" addressing at a minimum four specific situations;[8] and (c) directs that the new rules "shall not require agreement or formal collaboration to establish coordination."

Rather than await the product of the mandated FEC rulemaking (which would, of course, be subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.*), appellants flocked directly to the three-judge district court to insist that it would be impossible for the new, not-yet-drafted coordination rules *ever* to comply with the First Amendment. Meanwhile, the Commission proceeded with its coordination rulemaking, as directed by Congress. The FEC issued its Notice of Proposed Rulemaking on September 24, 2002, received written comments and held a public hearing in October, and adopted its replacement rules on December 5—the very day of oral argument on appellants' challenge to Section 214 in the district court. The Commission transmitted its new rules to Congress on December 18 and published them in the *Federal Register* on January 3, 2003. *See* 68 Fed. Reg. 421 (detailing rulemaking history). Many of the appellants

[7] Statement of Reasons of Commissioner Thomas and Chairman McDonald in *In re The Coalition, et al.*, MUR 4624, at 8, 12 (FEC Sept. 7, 2001); *see also* Statement of Reasons of Commissioners Thomas and McDonald in *In re Republicans for Clean Air*, MUR 4982, at 9-10 (FEC Apr. 23, 2002); 148 Cong. Rec. 2144-45 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold).

[8] Section 214(c) directs the Commission to address (a) "payments for the republication of campaign materials"; (b) "payments for the use of a common vendor"; (c) "payments for communications directed or made by persons who previously served as an employee of a candidate or a political party"; and (d) "payments for communications made by a person after substantial discussion about the communication with a candidate or a political party."

participated actively in the rule-making (as did many of the intervenor-appellees).[9]

The district court correctly held appellants' challenge to the rulemaking mandate of Section 214 to be nonjusticiable. *See* JSSA 144-56sa (per curiam). Whether evaluated under principles of standing, ripeness, finality pursuant to 5 U.S.C. § 704, exhaustion of administrative remedies, or subject-matter jurisdiction, appellants' challenges to Section 214's rulemaking provisions were not properly before the three-judge district court.[10] To begin, appellants lack Article III standing, for they can have suffered no "specific objective harm" from a mere congressional instruction to the FEC to rewrite its coordination rules. JSSA 145sa (per curiam); *see generally* JSSA 145-48sa (per curiam). Until final rules were in place, it was entirely speculative whether any particular conduct in which an appellant wished to engage might be covered by the revised rules or not.

It is also well-settled under principles of ripeness, finality, and exhaustion that litigants may not attempt to end-run congressionally established rulemaking procedures for resolving an issue by seeking to litigate that issue directly in court. *See* JSSA 148-56sa (per curiam); *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 430, 437-39 (1977) (matters subject to pending rulemaking were "not ripe for review," because final rules might "eliminate, limit, or cast [the constitutional claims] in a different light")

[9] Portions of the new coordination rules have been challenged under the APA by Reps. Shays and Meehan. *See Shays* v. *FEC*, Civ. Action No. 02-CV-1984 (D.D.C.). To our knowledge, that is the only challenge that has been brought against the new coordination rules.

[10] Some of these challenges are also now moot. For example, appellants argued below that Section 214(b), which repealed the FEC's former rules, "substantially aggravated the constitutional violation" by creating a period when there were no definitional rules in place. *See* JSSA 144sa (per curiam). As the district court majority held, the Commission's promulgation of new rules rendered this "aggravation" claim moot. JSSA 136sa n.88, 144sa (per curiam).

(internal quotation marks omitted).[11] These ripeness principles apply fully in the First Amendment context. *See* JSSA 145sa, 149-55sa (per curiam); *Renne* v. *Geary*, 510 U.S. 312, 320-324 (1991).[12]

In addition, any challenge to the outcome of the FEC rulemaking on coordination must be brought in a single-judge district court in an action for judicial review under the APA. BCRA's special jurisdictional grant "does not extend to the consideration of FEC regulations." JSSA 144sa (per curiam); *see* JSSA 155-56sa (per curiam). The special jurisdictional provisions of BCRA Section 403(a) for a three-judge district court are limited to "any action . . . brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act." Those provisions do not extend the subject-matter jurisdiction of the three-judge district court to challenges to administrative rules promulgated pursuant to BCRA. Thus, there is no basis for challenging such rules outside the usual APA framework. *See also FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984) ("[l]itigants may not evade" statutory procedures for judicial review of matters committed to agency's rulemaking process by commencing *de novo* actions in district court).[13]

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[11] *See also New Mexicans for Bill Richardson* v. *Gonzales*, 64 F.3d 1495, 1504 n.5 (10th Cir. 1995); *Public Citizen Health Research Group* v. *FDA*, 740 F.2d 21, 29 (D.C. Cir. 1984).

[12] *See also Martin Tractor Co.* v. *FEC*, 627 F.2d 375, 378 (D.C. Cir.) (affirming dismissal of First Amendment challenges to allegedly ambiguous FECA language as "nonjusticiable as a constitutional matter and inappropriate for adjudication as a prudential matter," given the opportunities for clarification through the FEC), *cert. denied*, 449 U.S. 954 (1980); *Clark* v. *Valeo*, 559 F.2d 642, 647 (D.C. Cir.) (per curiam) (judicial review of various FECA issues inappropriate "because the unripeness of the action is so pervasive"), *aff'd*, 431 U.S. 950 (1977).

[13] Judge Henderson appears to have concluded that BCRA's jurisdiction should be extended to the FEC's rules on the theory that "extreme" hardship would otherwise result "because ordinary APA review of the regulations could take several months or even years." JSSA

Appellants have argued that they are not required to await the outcome of the FEC's rulemaking because (they contend) the First Amendment *requires* an outright "agreement" for any expenditure to be treated as "coordinated," whereas Section 214(c) *prohibits* the FEC from requiring an agreement to demonstrate "coordination." *See* JSSA 136-37sa & n.89, 146sa (per curiam); McConnell J.S. 16. The district court majority dissected this argument at length and correctly found it to be "inconsistent with the holdings of *Buckley* and its progeny." JSSA 146sa (per curiam); *see also* JSSA 138-43sa (per curiam). As the district court stressed, *Buckley* expressly endorsed treating expenditures made "'at the request or suggestion of the candidate or his agent[ ]'" as "coordinated," a standard that clearly does *not* "equate to agreement." JSSA 139sa (per curiam) (quoting *Buckley*, 424 U.S. at 47 n.53) (internal citations omitted); 143sa (per curiam).[14]

It is therefore untenable to assert that any provision of Section 214 *requires* the FEC to violate any constitutional principle articulated in this Court's decisions applicable to coordinated expenditures. Accordingly, appellants have no basis for disregarding the rulemaking procedures established by Congress, which may well have resolved many if not all of their practical concerns without the need for litigation on this issue. *See* JSSA 148sa, 150-52sa, 155-56sa (per curiam). Of course, if appellants are dissatisfied with the outcome of the FEC's rulemaking, they can challenge the Commission's coordination rules in an action

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396sa. As the majority explained, that position does not take account of the fact that expedition and interim relief are available in APA challenges. JSSA 155-56sa & n.98-99 (per curiam). In any event, that argument cannot supply subject-matter jurisdiction to review rulemaking issues where no such jurisdiction has been granted by Congress.

[14] *See also Colorado Republican Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604, 614 (1996) (plurality opinion) (*Colorado I*); (recognizing need to reach "general . . . understanding[s]"); *Colorado II*, 533 U.S. at 442 (same, with respect to "wink or nod" arrangements).

under the APA, in which they may raise both constitutional and statutory challenges to those rules.[15]

C. Section 214 makes two other minor changes to FECA outside the rulemaking context. Any challenges to those provisions that might be raised by appellants are insubstantial.

First, Section 214(a) extends FECA's longstanding regulation of coordination with candidates and candidate committees to include coordination with any "national, State, or local committee of a political party" as well. As the district court majority explained, Congress simply took the "same definition [that] has been applied to expenditures coordinated with political candidates for over 25 years," and applied it to coordination with parties. JSSA 135sa (per curiam). In doing so, Congress acted on the need to avoid circumvention of FECA's contribution limits, a necessity long recognized by both this Court and Congress.[16] Congress has found that, to enforce those contribution limits effectively, it is necessary to apply the coordination regulations to coordination with both candidates and parties. There is no basis in law or in the record to set aside this congressional judgment. As the district court majority concluded, "[appellants] have provided no explanation as to

[15] Judge Henderson expressed the view that vague coordination standards could threaten to interfere with protected lobbying and information-gathering activities. *See* JSSA 280-86sa, 386-96sa. Again, that point is a question for APA review of the FEC's coordination regulations rather than this litigation. Moreover, the sponsors of BCRA repeatedly emphasized that any rule that sought to find "coordination" based on genuine lobbying activities would be contrary to Congress's intent. *See, e.g.*, 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). Consistent with that legislative intent, the FEC's new rules contain a safe-harbor provision for "responses to inquiries about legislative or policy issues." 68 Fed. Reg. at 455 (quoting new 11 C.F.R. § 109.21(f)). Thus, as the district court majority explained, appellants' claims that their genuine lobbying activities could be in jeopardy are speculative at best, and are insufficient to meet Article III standing requirements. *See* JSSA 147sa n.95. (per curiam).

[16] *See Colorado II*, 533 U.S. at 447, 464; *Buckley*, 424 U.S. at 46-47 & n.53, 78; 2 U.S.C. § 441a(a)(7)(B)(i).

why the application of this coordination formula to the context of political parties chills political speech any more than when applied to expenditures coordinated with political candidates." JSSA 137sa (per curiam).

Second, appellants may raise a First Amendment constitutional challenge to BCRA Section 214(d). As the district court majority explained, however, that provision simply amends 2 U.S.C. § 441b to bring its definitions into alignment with other sections of FECA. JSSA 156-57sa (per curiam). Thus, any challenge to Section 214(d) is likewise insubstantial and does not warrant this Court's plenary consideration.

CONCLUSION

In No. 02-1674, the Court should summarily dispose of appellants' challenges to Sections 211, 212, and 214. In other respects, the Court should note probable jurisdiction of the appeals in No. 02-1674 and No. 02-1675 and set those cases for plenary review.

Respectfully submitted,

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